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No. 97-361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DARRELL COMBS,
Petitioner,

v.

MEADOWCRAFT, INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.6 LISTING

Respondent Meadowcraft, Inc. has no parent or subsidiary company.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Meadowcraft, Inc. ("Meadowcraft") respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the United States Court of Appeals for the Eleventh Circuit's opinion in this case.

STATEMENT OF THE CASE

Meadowcraft adopts the Background Facts and Procedural History sections of the Eleventh Circuit's opinion and incorporates them herein by reference. *See* Pet. App. 3a-6a.

Following the adverse judgment in the district court, Meadowcraft appealed to the Eleventh Circuit arguing that it was entitled to judgment as a matter of law or, in the alternative, to a new trial. After "consider[ing] the entire record in the light most favorable to [petitioner]," Pet. App. 38a, the Eleventh Circuit ruled that Meadowcraft was entitled to judgment as a matter of law. Although the Eleventh Circuit indicated that there was sufficient evidence in the record for a jury to believe that two of the nondiscriminatory reasons offered by Meadowcraft did not motivate Meadowcraft's decision to promote someone other than petitioner, Pet. App. 40a-47a, the appellate court concluded after its review of the record that petitioner "failed to produce evidence sufficient to permit a reasonable factfinder to disbelieve Meadowcraft's proffered nondiscriminatory reason that it promoted Walker instead of [petitioner] because Walker had supervisory experience." Pet. App. 53a. Based on that conclusion, the Eleventh Circuit reversed the judgment of the district court and remanded the case for entry of judgment in favor of Meadowcraft. *Id.*

REASONS FOR DENYING THE WRIT

I. The first question presented by petitioner does not merit review by this Court.

This Court should not accept petitioner's first question presented for review for at least four reasons: (1) the issue was not raised by petitioner in the courts below; (2) the question is premised on a faulty reading of the Eleventh Circuit's decision; (3) there is no split of authority among the federal circuits; and (4) the question is internally inconsistent and confusing.

A. The question was not raised by petitioner in the Eleventh Circuit or the district court.

Petitioner failed to raise the argument he now advances in his first question in either the Eleventh Circuit or the district court. As best respondent can decipher, petitioner argues in this Court that, when an employment discrimination plaintiff presents sufficient evidence for a jury to believe that two nondiscriminatory reasons offered by the defendant for its employment decision did not actually motivate the defendant's decision, there should be a *per se* rule which allows the jury to infer that any additional nondiscriminatory reasons offered by the defendant are pretextual. In his brief on the merits in the Eleventh Circuit, however, petitioner did not make that argument. Instead, petitioner's brief outlined evidence allegedly undermining the three specific nondiscriminatory reasons offered by Meadowcraft, thus adhering to the precise analytical outline ultimately followed by the Eleventh Circuit. Not once in his Eleventh Circuit brief did petitioner suggest that presentation of evidence sufficient to allow the jury to disbelieve that one or more of the proffered reasons actually motivated Meadowcraft required the trial court to reject Meadowcraft's motion for judgment as a matter of law. It was not until he sought en banc review of the Eleventh Circuit panel's opinion that petitioner first raised the

argument on which he now seeks certiorari review. Appellee's Suggestion of Rehearing En Banc at 11.

Petitioner also failed to request any jury instruction in the district court consistent with the legal argument underlying the first question presented. Although plaintiff sought instructions on a variety of points, he did not ask that the jury be instructed that, if the jury concluded that one or more of the defendant's nondiscriminatory reasons did not actually motivate the defendant's decision, it could infer that the defendant's other nondiscriminatory reasons also did not actually motivate the defendant.

This Court has consistently rejected attempts by litigants to raise legal issues in a petition for writ of certiorari which were not presented to the lower federal courts involved in the case. *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); *accord Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981). Petitioner's failure to raise in the lower federal courts the issue on which he now seeks review means that the petition should be denied.

B. Petitioner's argument is based on an erroneous reading of the Eleventh Circuit's opinion.

In addition to his failure to raise the issue below, petitioner's first question is also unworthy of review because it is based on a faulty reading of the Eleventh Circuit's opinion. An essential premise of petitioner's argument is that the Eleventh Circuit did not look at the record as a whole in reaching its decision; instead, petitioner's argument assumes that the Eleventh Circuit looked solely at evidence directly rebutting each separate nondiscriminatory reason put forward by Meadowcraft. The Eleventh Circuit's opinion, however, belies this assumption. The Eleventh Circuit stated that it "consider[ed] the entire record in the light most

favorable to [petitioner] for the limited purpose of ascertaining whether there was sufficient evidence for [petitioner] to withstand Meadowcraft's motions for judgment as a matter of law." Pet. App. 38a. In addition, the appellate court noted that it specifically "consider[ed] the evidence submitted by [petitioner] in connection with his prima facie case in evaluating whether a reasonable jury could disbelieve Meadowcraft's proffered nondiscriminatory reasons for its actions." Pet. App. 39a n.11 (emphasis omitted). Indeed, the latter statement by the Eleventh Circuit directly undermines petitioner's contention that the Eleventh Circuit did not consider the evidence petitioner offered in support of his prima facie case. *See* Petition for Cert. at *i*. Thus, the premise of petitioner's argument — that the Eleventh Circuit's analysis was confined to a rigid analysis of evidence only directly relevant to the separate nondiscriminatory reasons — cannot withstand scrutiny.

C. There is no conflict of decisions among the lower federal courts.

Petitioner's contention that there is a conflict of decisions among the lower courts concerning the matter at issue in his first question is inaccurate. The decision by the Eleventh Circuit in this case is consistent with the prior decisions of this Court and with the rulings by other courts of appeals. The framework for presentation of proof in employment discrimination cases first announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and refined most recently in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (internal quotation omitted). Because each case turns on its facts, there may be times when rebuttal evidence introduced with respect to one or more of the proffered nondiscriminatory

reasons obviates the need for a plaintiff to present additional rebuttal evidence with respect to the remaining reasons in order to survive a motion for judgment as a matter of law. In other cases, however, the evidence submitted by the plaintiff with regard to some of the reasons will not be strong enough to preclude entry of judgment as a matter of law for the defendant. In this case, after considering all the evidence in the light most favorable to petitioner, the Eleventh Circuit concluded that a reasonable jury could not reject as pretextual one of the nondiscriminatory reasons proffered by Meadowcraft.

None of the cases offered as support by petitioner for the alleged circuit split is inconsistent with the decision of the Eleventh Circuit. In one of the cases identified by petitioner, the Ninth Circuit held that "where . . . an employer articulates several alternative and independent legitimate nondiscriminatory reasons, the falsity of one does not necessarily justify the finding that the remaining articulated reasons were pretextual." *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 600 (9th Cir. 1993) (internal quotation and citation omitted).[1] Far from adopting the *per se* rule advocated by petitioner, the Ninth Circuit in that holding recognized that each case must be evaluated on its facts in order to determine whether the case should be submitted to the jury.

Similarly, the excerpt from a Third Circuit opinion highlighted by petitioner, although it is *dicta*, also speaks in terms of a flexible approach. *See Fuentes v. Perskie*, 32 F.3d 759, 764 n.7 (3d Cir. 1994) ("the factfinder's rejection of some of the defendant's proffered reasons *may* impede the employer's credibility seriously enough so that a factfinder may rationally

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[1] In addition, that *Odima* was decided before *Hicks* makes petitioner's reliance on it in support of a claimed post-*Hicks* circuit split quite suspect. The same is true of at least one other case cited by petitioner. *See Roebuck v. Drexel Univ.*, 852 F.2d 715, 734 n.32 (3d Cir. 1988).

disbelieve the remaining proffered reasons" (emphasis added)). The Seventh Circuit decision erroneously cited by petitioner in support of the alleged circuit split also recognizes that the particular facts of each case must be evaluated to determine whether evidence presented by the plaintiff with regard to some of the alleged nondiscriminatory reasons is sufficient for the plaintiff to defeat a motion for judgment as a matter of law based on the plaintiff's failure to rebut the remaining proffered reasons. *See Russell v. Acme-Evans Co.*, 51 F.3d 64, 70 (7th Cir. 1995) ("There *may* be cases in which the multiple grounds offered by the defendant for the adverse action of which the plaintiff complains are so intertwined, or the pretextual character of one of them so fishy and suspicious, that the plaintiff could withstand summary judgment." (emphasis added)). The final case cited by petitioner, which arises out of the First Circuit, is not even relevant to petitioner's argument because the plaintiff in that case presented sufficient evidence to rebut each of the proffered nondiscriminatory reasons. *See Molloy v. Blanchard*, 115 F.3d 86 (1st Cir. 1997).

In sum, the Eleventh Circuit's decision is not out of step with the holdings from other circuits. Contrary to petitioner's suggestion, no court has adopted the *per se* rule championed by petitioner which would require an employment discrimination case to be submitted to the jury whenever the plaintiff has presented sufficient evidence for the jury to disbelieve one or more of the proffered nondiscriminatory reasons. Indeed, of the few circuits which have actually addressed this matter, all have adhered to a flexible approach consistent with the prior decisions of this Court. There is not a hint of disagreement among the circuits which would merit review by this Court.

D. The question as posed by petitioner is internally inconsistent and confusing.

In addition to the aforementioned reasons to deny review, petitioner's first question is so poorly framed that it does not

present a clear picture of the legal issue upon which petitioner bases his request for review. In fact, in the first question, petitioner provides two different versions of the question which are not consistent. In the first of petitioner's two versions of the question, petitioner focuses on whether a jury "may infer intentional employment discrimination . . . from evidence of the falsity of some of the defendant's articulated nondiscriminatory reasons." Petition for Cert. at *i*. The other formulation of the question put forward by petitioner carries a quite different meaning. In that second version of the question, petitioner asks "whether a plaintiff . . . is limited to proving his claim with evidence specifically rebutting each and every articulated reason where the defendant has proffered multiple reasons for a single employment action." *Id.* Thus, petitioner completely abandons his focus on the falsity of reasons and resulting inferences in favor of a formulation of the question that highlights the proof scheme at issue in employment discrimination cases. This inconsistency will create confusion for the parties and the Court if review is granted, especially in view of the fact that neither version of the question corresponds closely to the position advanced by petitioner in the argument section of his petition.

Petitioner's question also completely disregards the requirements of this Court's Rule 14.1(a). That rule requires that questions presented be "expressed concisely in relation to the circumstances of the case" and that they "not be argumentative or repetitive." Even the most cursory examination of petitioner's first question reveals that it violates each of those admonitions. The prejudice to respondent and the Court from this failure to adhere to Rule 14.1(a) is quite real. The question as framed is extremely difficult to decipher, thus leaving all interested parties in a state of confusion as to the precise matters petitioner seeks to put at issue.

II. The second question presented by petitioner, whether the Eleventh Circuit improperly weighed the evidence, involves the factbound application of settled law.

Petitioner's second question presented seeks this Court's review of the factbound application of settled law by the Eleventh Circuit. This Court has clearly established the standards which govern when an appellate court may overturn a jury's verdict, and petitioner makes no argument to the contrary. Instead, petitioner contends that the Eleventh Circuit misapplied this Court's precedents in deciding that the district court should have entered judgment as a matter of law. Petitioner had a full and fair opportunity to present its fact-specific arguments in favor of affirming the jury's verdict to the Eleventh Circuit, and review of the Eleventh Circuit's decision would require this Court to engage in a complete, painstaking review of the trial record.[2] Because there is no uncertainty among the lower courts concerning the legal standard at issue in this question, this question does not merit an expenditure of this Court's scarce resources.

In addition to the absence of any uncertainty concerning this area of the law, this question is also due to be denied based on numerous misstatements contained in petitioner's argument. For example, petitioner argues in support of this question that "[t]he court of appeals erred by failing to view the evidence as a

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[2] In fact, if review were to be granted, this Court would also have to examine other aspects of the Eleventh Circuit's opinion. For example, the Eleventh Circuit concluded that the plaintiff had presented sufficient evidence for the jury to conclude that two of the nondiscriminatory reasons proffered by Meadowcraft did not actually motivate Meadowcraft's decision. Meadowcraft believes that the evidence identified by the Eleventh Circuit as sufficient to create a jury issue on those two reasons in fact could not as a matter of law have created a jury issue. If this error is corrected, that would provide an alternate basis for the Eleventh Circuit's reversal of the district court's judgment.

whole in support of the jury verdict." Petition for Cert. at 22. As noted above, however, the Eleventh Circuit expressly stated that it "consider[ed] the entire record in the light most favorable to [petitioner]" in deciding whether judgment as a matter of law should have been entered. Pet. App. 38a. In fact, the Eleventh Circuit discussed and expressly rejected in its opinion most of the evidentiary arguments which petitioner now presses in this Court.[3] *See, e.g.*, Pet. App 9a n.3 (rejecting contention that Meadowcraft had no established criteria for promotion); *id.* (rejecting contention based on statistical evidence); *id.* at 51a-53a (rejecting contention that financial impropriety of Walker discredited his supervisory experience).

The Eleventh Circuit properly applied well settled standards for determining whether judgment as a matter of law should have been entered. This Court should decline petitioner's invitation to conduct a full scale factual review of the Eleventh Circuit's decision and the trial record.

III. There is an alternative basis for the Eleventh Circuit to reverse the district court's judgment, which renders pointless the requested review by this Court.

Even if the Eleventh Circuit did not invoke a proper rationale in reversing the district court's judgment, there is an alternative rationale to support the same result. Meadowcraft argued in the Eleventh Circuit that it was entitled to a new trial based on, *inter*

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[3] Petitioner also seeks to introduce arguments in support of his second question which he did not make in the Eleventh Circuit. For example, petitioner claims that the Eleventh Circuit improperly ignored evidence that plant personnel told petitioner to hide whenever company officials visited the plant, and petitioner claims that that is evidence of intentional discrimination in Meadowcraft's decision to promote someone other than petitioner. Petition for Cert. at 18. Petitioner, however, never made that argument in the trial court or the Eleventh Circuit. Instead, petitioner offered that evidence in support of a hostile environment claim, which was rejected by the jury and was not appealed by petitioner.

alia, prejudicial admission of inadmissible evidence. In particular, the district court indicated in the midst of trial that it would allow an extremely prejudicial newspaper article concerning the person promoted instead of petitioner to be shown to the jury, even though petitioner had failed to list the article as an exhibit and even though petitioner failed to establish the appropriate evidentiary foundation for the exhibit's introduction. R4-485 to 487; R4-509 to 520. As a result of that ruling, counsel for petitioner was permitted to question that person when he was called as a witness concerning the facts described in the article. R4-514 to 519. In addition, the jury was allowed to read the article. R4-520. After all that took place, the district court changed its ruling, agreeing that the article was inadmissible, but the district court nonetheless allowed petitioner to refer to the article in closing argument.[4] R6-1036 to 1038. Because the Eleventh Circuit ruled that Meadowcraft was entitled to judgment as a matter of law, it did not reach the question of whether Meadowcraft was entitled to a new trial based on the problem with the newspaper article or any other ground. Pet. App. 6a-7a n.2. Thus, even if this Court were to grant the petition and rule in petitioner's favor on the merits, the exercise would be purely academic due to the existence of the separate basis for reversal of the district court's judgment. To grant a petition for certiorari in such a circumstance would be a waste of this Court's limited resources.

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[4] Notwithstanding the district court's ultimate refusal to admit the newspaper article, petitioner cites that exhibit, Plaintiff's Exhibit 31, in the fact section of his petition. Petition for Cert. at 2.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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